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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANDREW LEMUS, Defendant and Appellant.	B231036 (Los Angeles County Super. Ct. No. TA096889)

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Affirmed as modified.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Andrew Lemus (appellant) appeals from the judgment entered following a jury trial resulting in his convictions of two counts of first degree murder (Pen. Code, § 187, subd. (a); counts 1 & 2)[1] with findings he personally used a firearm and intentionally discharged a firearm proximately causing death (§ 12022.53, subds. (b) & (e)) and of multiple murder special circumstance (§ 190.2, subd. (a)(3)). The jury also found that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C).[2] In sentencing appellant for the murders in counts 1 and 2, the trial court imposed two consecutive terms of life without the possibility of parole, each enhanced by a term of 25 years to life for the discharge of a firearm. The trial court imposed various fines and court fees and awarded appellant 1,212 days of presentence custody credit.

Appellant contends that (1) the trial court should have excluded his confession obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), (2) prejudicial prosecutorial misconduct requires reversal of the judgment, (3) there was insufficient evidence to support the convictions, (4) the imposition of life sentences for the use of a firearm violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution, (5) it was error to charge the jury with a flight instruction, (6) refusal to disclose juror information was an abuse of discretion, and (7) the trial court improperly imposed a parole revocation fine.

We strike the parole revocation fine but otherwise affirm the judgment.

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1 All further statutory references are to the Penal Code unless otherwise stated.

2 The jury deadlocked on charges of assault with a firearm (§ 245, subd. (a)(2); counts 3 & 4) and making criminal threats (§ 422, counts 5 & 6). The trial court declared a mistrial as to those counts, which were ultimately dismissed.

FACTUAL BACKGROUND[3]

Prosecution Case

The Shooting

Around 11:30 a.m. on April 20, 2008, Charles Lemus saw his brother Andrew, appellant, talking to their grandmother in the kitchen of their home at 2547 East 127th Street, in the City of Compton. Appellant, a Largo 36 gang member whose moniker was "Andoe," appeared to be hung over from drinking the night before and left to get Gatorade from the liquor store. He drove away in his gray Mustang with black racing stripes. Charles was online on the computer in the living room, which had a window that faced 127th Street. Although the computer had a clock, the time was incorrect and he did not know the exact time appellant left. He believed it was around noon.

At 1:23 p.m., David Gallegos, a wheelchair-bound paraplegic, left his residence to go to the International House of Pancakes on Alameda and Compton. He was accompanied by his friend Rigoberta Vega who pushed Gallegos down the sidewalk, south on Alameda.

Shortly before 1:30 pm., Carlos Cruz was driving north on Alameda near the intersection of Alameda and Palmer when he observed a gray automobile coming towards him, travelling south on Alameda. The automobile made a U-turn in front of Cruz and drove slowly towards Gallegos and Vega. Cruz recognized the automobile as a Mustang and saw the word "Mustang" on the car behind the trunk. The driver and front-seat passenger were both Latinos, approximately 18 to 20 years old, and both appeared to have shaved heads. The passenger wore a short-sleeved white shirt. Cruz slowed down behind the Mustang and stopped his car. He heard yelling and then saw a big black shiny gun pointed from the passenger side of the Mustang. Cruz observed Gallegos raise his hands and then heard three gunshots. Vega tried to hide behind the wheelchair and Cruz

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[3] We do not discuss the facts underlying counts 3 through 6 because they are not relevant to any issues on appeal.

heard two more gunshots. Cruz tried to get the license plate number but the Mustang drove quickly away northbound on Alameda and turned left.

Aishah Daoud, her sister Zakiya Daoud, and Sharice Royal left Tam's Burgers near the intersection of Palmer and Alameda and were on the way to their church for a "Teen Girls Meeting" scheduled to begin at 2:00 p.m. As they crossed Alameda they heard gunshots.

Aishah looked in the direction of the gunshots and saw a gray Mustang with two black racing stripes. She saw Vega who had been pushing the wheelchair fall to the ground. The shooter fired two more shots in Gallegos's direction. Aishah ran into the church.

Zakiya saw Vega fall to the ground. The shooter first lowered the long-barreled black gun and then raised it again. Gallegos covered his face with his hands and then slumped over in the wheelchair. Zakiya saw a gray Mustang with two black racing stripes that had been stopped during the shooting. The Mustang then drove away at a fast speed northbound on Alameda.

Sharice Royal saw Vega slump over the wheelchair and then fall to the ground after the first set of gunshots. Standing in the gutter, the shooter raised "a real big" black gun and shot Gallegos who was in a wheelchair on the sidewalk. The shooter was a Hispanic male in his "late teens, early 20's," who had a very short haircut and wore a black hoodie sweater. He got into a gray Mustang with black racing stripes which drove away northbound on Alameda, and turned left on Elm. As Sharice ran towards the church she called 9-1-1.[4]

Appellant's Residence

Charles Lemus remained online playing games and chatting on the computer while appellant was gone. His back was to the window facing 127th Street but he looked out

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[4] A call reporting shots fired was received by the 9-1-1 dispatcher at 1:26 p.m. on April 20, 2008, and originated from 357 Palmer Street which was in the vicinity of the church that the Daoud sisters and Sharice Royal attended.

occasionally. He testified that he heard the bottom of the car scrape the ground when appellant returned in the Mustang and pull into the driveway because appellant was driving fast.[5] Appellant got out of the car and ran to the patio. He was wearing a white shirt underneath a black jacket which he removed. Charles saw appellant talk to their uncle, George Gomez.

Gomez, who lived next door to appellant returned with breakfast for his family between 10:00 and 10:30 a.m. and remembered seeing appellant sitting on the patio. Sometime between 1:30 and 2:00 p.m. as Gomez and his family were leaving their home appellant asked him to move his truck and block appellant's Mustang which was parked in the driveway. Appellant was "talking really fast" and appeared "anxious or excited." Gomez told appellant he could not help him because he was leaving. Gomez called his cousin Daniel Renteria, who was across the street at a barbecue, and asked him to move his SUV into appellant's driveway.

Daniel Renteria, appellant's uncle, arrived for the barbecue with his brother Ricardo Renteria "a little past 12:00" and parked on the street next to the curb. He did not remember how long he was at the barbecue when he got a call from his cousin George Gomez. He came out, moved his Suburban forward, turned it off and got out. Appellant came outside and told Daniel to back the Suburban into the driveway to his house. Daniel moved his Suburban into appellant's driveway blocking the Mustang and then returned to the barbecue across the street.

Ricardo Renteria testified that he and Daniel went to a family party in Riverside between 7:00 and 8:00 p.m. the previous evening and stayed there until 3:00 a.m. He and Daniel got to the barbecue on April 20, 2008, between 11:00 a.m. and 12:00 p.m.[6] His brother parked the Suburban on the street and Ricardo went to the barbecue. When the police arrived and he went out to the street he saw that the Suburban had been moved

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5 Charles later testified that appellant "usually drives like a maniac" but on this occasion he "calmly drove" into the driveway.

6 At the preliminary hearing he testified that he got there at 12:00 p.m.

from where it was originally parked and was now backed up against the Mustang in appellant's driveway.

Charles later told the police that after Daniel Renteria moved the Suburban to block the driveway he saw appellant meet up with two shaved-headed Hispanic males in white T-shirts in the middle of the street. The three of them walked away but Charles did not know which direction appellant went.

The Investigation

At approximately 1:30 p.m., Los Angeles County Sheriff's Detective Adam Kirste and his trainee Deputy Lucio Venegas conducted a traffic stop in an unincorporated area of Los Angeles near the City of Compton. Detective Kirste received a call from dispatch regarding a shooting that occurred close to their location. The dispatch operator described the getaway car as a silver Ford Mustang with two black racing stripes. Ten seconds after hearing the broadcast, Detective Kirste looked up and observed a vehicle matching the description travelling eastbound on 130th Street at approximately 50 miles per hour in an area where the posted speed limit was 25 miles per hour.

Detective Kirste broadcast over the radio that he had seen the Mustang and he and Deputy Venegas drove on 130th Street in the same direction as the Mustang. They turned north on Alameda and saw a silver car travelling eastbound on El Segundo Boulevard and followed it until they could see that it did not have any black racing stripes. After driving for approximately 15 minutes looking for the Mustang, they encountered some pedestrians on Alameda who informed them that the Mustang had turned left on 127th Street.

Between 1:43 and 1:46 p.m. as Deputy Venegas drove slowly on 127th Street, Detective Kirste saw a Mustang parked in appellant's driveway at 2547 East 127th Street. A gold or brown Suburban almost completely blocked the view of the Mustang. Detective Kirste broadcast over the radio that he had found the Mustang and other units arrived to assist him in setting up a containment of the house. A black hoodie was found on the back seat of the Mustang.

Charles Lemus and the people attending the barbecue at the house across the street, including Daniel Renteria and his brother Ricardo Renteria, were interviewed. Appellant was the only member of the Lemus, Renteria, and Gomez families that the police were unable to locate that afternoon and evening.

The eyewitnesses from the scene of the shooting were transported to appellant's house to view the Mustang. Aishah identified the vehicle as the Mustang she saw at the scene of the crime; Zakiya positively identified it as the Mustang she saw leaving the murder scene; Sharice Royal was "very positive" that the Mustang in appellant's driveway was the one she saw at the crime scene; and Carlos Cruz identified it as the same one used in the shootings.

Los Angeles County Sheriff's Lieutenant Steven Katz and Detective Randy Seymour were assigned to respond to the call that shots were fired in the vicinity of Alameda and Palmer. They arrived at the crime scene at 3:00 p.m. and found both victims had been pronounced dead at the scene. Lieutenant Katz and Detective Seymour arrived at appellant's house at 3:20 p.m. and search warrants were executed at a number of residences on 127th Street. A blue Los Angeles Dodgers windbreaker was found in a washing machine located in the outside patio of the house next door to appellant's, where his grandparents and aunt Irma lived. The windbreaker was dry and had not been washed.

Lieutenant Katz conducted several interviews during the course of the investigation that day. Charles Lemus was interviewed twice while in the back of a patrol car. The first occurred outside his home and the second with his aunt Irma present, occurred at a field command post. A tape of both interviews was played in court.

Daniel Renteria told Lieutenant Katz that he moved his Suburban into the driveway of appellant's house after he received a call from his cousin George Gomez. Gomez told Renteria that appellant had asked him to move it.

Detective Kirste drove from the murder scene to appellant's residence on a route that incorporated driving eastbound on 130th Street where he had reported seeing a vehicle that matched the description of the Mustang. He drove early on a weekday

morning at the approximate speed he saw the Mustang travelling. He completed the trip in four minutes and one second. He did it a second time and the total trip took three minutes and 52 seconds.

Sometime between 11:30 p.m. and midnight, Lieutenant Katz was informed that appellant was at the Century Sheriff's station. Lieutenant Katz interviewed appellant and a tape of the interview was played in court. Appellant told Lieutenant Katz that he was at church all day. Between 2:00 and 3:00 a.m. the following morning Sheriff's detectives interviewed Jose Vasquez, Sr., the pastor of the church, and his son Jose Vasquez, Jr.

Appellant told Lieutenant Katz that he was at church on April 20, 2008. He said he got there "like before twelve, because Sunday school ends at twelve so I was there at twelve." He told Lieutenant Katz that the pastor lives across the street from him and that he "caught a ride to church" with his friend Junior, the pastor's son "[a]t eleven something."

Jose Vasquez, Sr., the pastor at Apostolic Assembly Torre Fuerte, testified that on April 20, 2008, he and his wife got to the church at 8:00 a.m. He did not see appellant at Sunday school class which ran from 10:30 a.m. to noon. Regular services started at 1:30 p.m. There were two entrances to the church and from the platform at the front where Vasquez was situated he could see when people entered and left the church. Vasquez entered the church at approximately 1:45 p.m. and did not see appellant. He noticed appellant for the first time at 2:40 p.m. because "everybody was sitting and he was standing." Appellant was wearing a white short sleeved T-shirt.

On the day in question, Jose Vasquez, Jr. went to church with his wife and sister and arrived in time to teach Sunday school which started at 10:30 a.m. When Sunday school ended at 11:45 a.m., Vasquez, Jr., ran some errands and then returned to the church for services at 1:30 p.m. Appellant was never in Vasquez, Jr.'s car at any point that day. Vasquez, Jr., could not remember what time he saw appellant in the church but it was sometime during the 1:30 p.m. services.

Appellant appeared "worried" and "not stable" when he spoke to Vasquez, Jr., after the services. Vasquez, Jr., was unable to go home because the streets around his

home were blocked. His neighbors told him what was going on and he returned to the church where he watched news coverage of the murders. Later that night appellant's parents came to the church and took appellant to the sheriff's station.

Gang Evidence

Los Angeles County Deputy Probation Officer Edward Gomez testified that his investigation revealed a MySpace account owned by appellant.[7] One of appellant's friends on MySpace was named "Fuck cops loyalty and respect burry me a G." In gang culture, "G" means a fellow gang member. On that friend's page was a photo with the caption "RIP Devious, you're gonna but never forgotten." Appellant had "Rest in Peace, Devious" tattooed on his arm.

Los Angeles County Sheriff's Detective Aaron Gutierrez was called as the prosecution's gang expert. Compton Varrio Largo (CVL) 36 or Largo 36 had over 200 members. Detective Gutierrez testified that appellant, whose gang moniker was "Andoe," was a Largo 36 gang member. He based his opinion on reports he had reviewed of appellant's association with other known gang members, Largo 36 graffiti on CD cases recovered from the Mustang owned by appellant, and the numerous gang tattoos appellant sported. In addition to "Rest in Peace, Devious" appellant also had a tattoo of a demon or devil behind bars throwing up the "L" and "36" signs. Appellant also had "Hub City" which referred to Compton tattooed on his left arm and "L.A." tattooed on his right arm.

A pair of shower shoes was recovered during a search of appellant's cell at Men's Central Jail on which appellant had written "Hub City" and "L 36" and "C.P.T." Detective Gutierrez stated that gang members "do not take kindly to other people . . . putting the image or the front that they are gang members." If the gang members determine that the person claiming gang allegiance is not who he claims to be, he "could

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[7] Officer Gomez located appellant's MySpace account through appellant's then girlfriend "Jahiara" who married appellant in jail while he was awaiting trial in this matter.

be put in harm's way." This was another factor supporting Detective Gutierrez's opinion that appellant was a member of the Largo 36 gang.

It was stipulated by the parties that the primary activities of Largo 36 were murders, attempted murders, shootings, carrying loaded firearms, assaults with firearms, criminal threats, vandalism, and stealing vehicles. The parties also stipulated that certain identified members of Largo 36 were convicted of murder, attempted murder, and carrying a loaded firearm. Gang signs and symbols included C.V.L. 36, and Largo 36, and gang members would throw "L," "CVL," and "L 36" hand signs.

Responding to a hypothetical question based on the facts of this case, Detective Gutierrez opined that the drive-by murders of Vega and Gallegos were committed for the benefit of and in association with the Largo 36 gang. The gang benefited because the community was fearful and intimidated by these crimes. The gang's reputation was enhanced because a drive-by shooting is by definition a gang crime and this was committed in rival territory and showed "a brazen act of stopping in daylight hours and getting out." The gang also benefited because the participants in this crime were now known as the "muscle part of the gang" that were willing to shoot and commit violent acts on behalf of the gang.

Forensic Evidence

Telephone records

A custodian of records working for Sprint Nextel provided expert testimony regarding telephone records obtained from Sprint. He indicated that the timing, duration, and locations of cell phone calls can be determined from telephone records and cell tower locations.

Authenticated Sprint cell phone records for appellant's cell phone showed two incoming calls at 1:39 p.m. and at 1:44 p.m. on April 20, 2008. Neither call went to voicemail[8] and the records showed that appellant's phone was connected with a cell

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[8] Esther Lemus, appellant's grandmother testified that she spoke with appellant on his cell phone at approximately 1:45 p.m.

tower located near appellant's home. There were two cell towers located near the Apostolic Assembly Torre Fuerte church and if appellant's cell phone had been in the vicinity of the church the phone would have connected with those towers.

Autopsies

An autopsy was conducted and it was determined that Vega had suffered three gunshot wounds, one of which perforated the heart and was fatal. The second shot hit the left lung, and the third hit the liver and aorta. The second and third gunshot wounds would also have been rapidly fatal. Three medium-caliber bullets consistent with .38 Special or .357 Magnum caliber bullets were recovered from Vega's body.

An autopsy performed on Gallegos determined that the cause of death was two gunshot wounds to the head. Two bullets were recovered from Gallegos which were also consistent with .38 Special or .357 Magnum caliber bullets.[9] The gunshot wound to the left side of the head showed abrasions from gunpowder which meant the gun was between one-half inch to two feet away when discharged.

Gunshot residue

Joseph Cavaleri worked for the Los Angeles County Sheriff's Department Scientific Services Bureau and analyzed gunshot residue (GSR) kits in the crime lab. No GSR particles were found on the front, passenger seat or headliner area of the Mustang. He found one GSR particle from a fired weapon on the blue Los Angeles Dodgers windbreaker recovered on April 20, 2008 from the washing machine located on appellant's grandparents' property. He testified that the windbreaker could have been worn by the shooter or someone next to the shooter, or the clothing could have touched a surface that had GSR particles on it. It was also possible that the washing machine was contaminated with GSR particles and a particle was deposited when the windbreaker was placed in it.

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[9] Forensic analysis at the sheriff's crime lab determined that all five bullets were fired from the same gun.

Based on the facts of this case Cavaleri opined that the shooter did not wear the windbreaker. There were multiple shots fired and the windbreaker was recovered shortly after the shooting. Because of that short time frame, he would have expected to see many more GSR particles on the windbreaker if the shooter had been wearing it.

Defense Case

Anthony Martinez met appellant in 2002 when Martinez graduated from high school and appellant was in the 7th or 8th grade. After high school Martinez belonged to the F.C. tagging crew but then made the "jump" and became a Largo 36 gang member with the moniker "Jokes." Martinez played basketball and football with his best friend Raymond Rivera and appellant. He testified that there was a ranking system within the gang and he, appellant and Rivera belonged to the lowest level, which was referred to as the "partying type." Martinez had a criminal record and admitted possessing guns, stealing cars and selling drugs, but was never arrested for shooting or killing anybody. Martinez stated that appellant did not have to "put in work" for the gang and was into "strictly partying, smoking weed, you know, childish things like that. Nothing—nothing major."

Raymond Rivera belonged to the F.C. tagging crew when he was in high school. He did not have to do anything to get into Largo 36. He became a member "from being in and out of jail different times and being the guy with, like, drugs on [him] and stuff." Rivera stole cars and possessed and sold guns. He lived across the street from appellant and occasionally involved appellant in selling drugs from Rivera's house. He drove appellant's Mustang in the past and stated that Largo 36 gang members with driver's licenses borrowed and used the Mustang.

Santos Briones grew up on 127th Street and knew appellant all his life. He was friends with appellant's family and was close to George Gomez and Ricardo and Daniel Renteria. At approximately 9:00 p.m. on April 19, 2008, Briones went to appellant's house. Appellant, his brother Charles, their grandmother, and Ricardo and Alfred Renteria were present. Ricardo Renteria gave methamphetamine to appellant who was drinking beer. Briones, appellant, and Alfred Renteria left to go to a party and returned at

approximately 1:30 a.m. Briones did not recall seeing appellant's Mustang that night. Ricardo Renteria who did not own a car had left earlier but returned to appellant's house. They watched television and drank beer. Appellant was ill and vomiting at 5:00 a.m. when Briones left to go home.

Esther Lemus, who was appellant and Charles's grandmother, was staying at appellant's house to watch the brothers while their parents were in Las Vegas. She heard appellant vomiting when she got up at 6:00 a.m. on April 20, 2008. At noon he left to get Gatorade and returned within five to 10 minutes. Charles Lemus was sitting at his computer in the living room. When Esther left at 12:45 p.m. to take flowers to the cemetery, appellant's Mustang was in the driveway.

Irma Lemus was appellant's aunt and lived next door to appellant. On April 20, 2008 she left for the gym at approximately 12:20 p.m. and returned at approximately 1:40 p.m. She did not recall seeing appellant's Mustang parked in the driveway on either occasion. She testified that it was not possible to see a car parked in appellant's driveway from the computer desk in appellant's living room.

Claudia Rodriguez hosted a barbecue at her home on 127th Street on April 20, 2008. Ricardo and Daniel Renteria arrived for the party at approximately 10:30 a.m. She spent most of the time in the kitchen and could not see people coming in and going out of the house.

Margaret Mendenhall, a contract attorney, was hired to take notes during Ricardo Renteria's interview at appellant counsel's offices, on March 8, 2010. Ricardo said that he went to appellant's house on April 19, 2008 and used methamphetamines with appellant. He said that he used cocaine the following day at the barbecue party. He thought his brother Daniel left the party once.

DISCUSSION

I. *Miranda* Issue

A. Contention

Appellant contends the trial court erred in denying his motion to exclude the statements he made to Lieutenant Katz and Detective Seymour.[10] Appellant contends the entire interview must be suppressed because it was the product of a custodial interrogation during which the detectives posed questions that were designed to elicit incriminating information before issuing the *Miranda* admonition. He contends that the statement that he was at church all day was obtained prior to the *Miranda* warnings and his subsequent repetitions of that alibi after being *Mirandized* were tainted by his pre-*Miranda* statement. Appellant further contends that the detectives ignored his invocation of the right to counsel. We disagree.

B. Background

Appellant turned himself in to the Century Sherriff's station sometime after 10:00 p.m. on April 20, 2008, and was interrogated by Lieutenant Katz and Detective Seymour. Both officers were dressed in plainclothes. The interview lasted approximately 25 to 30 minutes and was audiotaped.

At the start of the interview, appellant's handcuffs were removed and he took off his jacket. Lieutenant Katz asked if appellant had any tattoos besides the ones visible on his arms. Appellant was asked to unbutton his shirt. Lieutenant Katz then told appellant that "[t]here's a lot going on" and that they should "start with the beginning" and immediately asked "what is your full name?" After a series of questions related to appellant's background including his age, address, and occupation, the following exchange occurred:

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[10] Detective Seymour's name was incorrectly spelled as "Simore" in the transcript of the interrogation. We use the spelling taken from Lieutenant Katz's trial testimony.

"[LIEUTENANT] KATZ: Okay . . . [sigh] Why are you here?

"[APPELLANT]: I came to see what's going on. I'm turning myself in, sir. I don't know what's up. I was at church, the whole day.

"[LIEUTENANT] KATZ: You were at church the whole day?

"[APPELLANT]: Yes Sir. Well not the whole day but like around twelve [inaudible].

"[LIEUTENANT] KATZ: You were at church at twelve.

"[APPELLANT]: Well before twelve because that's when Sunday school ends. Everyone [inaudible] and then service starts at one thirty. It's not regular I'm a Christian, [inaudible]."

Detective Seymour advised appellant of his *Miranda* rights including the fact that an attorney would be provided to appellant at no cost if he could not afford one. Appellant asked, "Public Defender right?" to which Detective Seymour responded, "Pardon me?" Appellant again asked, "A Public Defender?" and Lieutenant Katz stated, "Well yeah I guess," and "Yeah." Appellant responded "Okay" and stated that he understood his rights.

Appellant proceeded to tell the detectives that he got to church "before twelve" and that he "caught a ride to church with [his] friend, Junior." He identified Junior as the pastor's son and told the detectives that he was seen by a lot of people in the church. When Detective Seymour inquired what time the pastor would say that appellant got to the church, appellant stated, "On the real, I don't even want to say anything. Umh, I'll wait for my lawyer," and "I'm just saying I'm going to wait until my lawyer comes." The interview continued and appellant responded to the detectives questions and provided information regarding the pastor and other witnesses that would confirm his presence in the church. Appellant was taken into custody at the conclusion of the interview.

During the hearing on the motion to suppress, the court indicated that it had listened to appellant's interview and read the transcript.

Lieutenant Katz testified that it was his practice to ask biographical questions that were used to complete the booking slip prior to advising interviewees of their *Miranda* rights. He did not believe appellant was requesting an attorney when he asked about a public defender but instead was clarifying whether one would have to be paid for or provided free through the court process.

Appellant's father, Carlos Lemus, Jr., testified that Lieutenant Katz told him that his son should surrender because he was wanted for questioning. Carlos and his wife drove appellant to the Century Sheriff's station where a deputy took appellant inside for questioning.

Appellant's counsel sought to suppress the entire statement and argued as follows: (1) *Miranda* was triggered at the outset of the interview because appellant was subjected to a custodial interrogation; (2) Lieutenant Katz's biographical questions were designed to elicit incriminating responses; (3) appellant was confused and was not physically or mentally capable of waiving his Miranda rights; (4) appellant made three separate invocations of counsel during the interview; and (5) appellant's pre-*Miranda* statements were inadmissible and anything he said thereafter was tainted.

The court found that the initial questions posed by Lieutenant Katz "were based on a legitimate need for information" and were not designed to elicit incriminating information. The court found nothing in the record to indicate that appellant's statements were involuntary and ruled that he knowingly and intelligently waived his constitutional rights. Furthermore, appellant's invocation of counsel were equivocal and ambiguous. The court ruled that the entire statement was admissible.

C. Analysis

It should be noted that despite the trial court's ruling that the entire statement was admissible, the portion of the interview after appellant asked to wait for his lawyer was not introduced at trial. The transcript of the interview that was admitted ended when Detective Seymour asked appellant "What time is the Pastor going to say you got there?" The remaining statements that appellant made after stating that he wanted to wait for his attorney were not heard by the jury.

1. Standard of Review

"In midstream *Miranda* cases (where a defendant is interviewed before and after the giving of *Miranda* warnings), a defendant's postwarning inculpatory statements are generally admissible if the prewarning statements *and* the postwarning statements were voluntarily made. [Citation.]" (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1363–1364.) '"Even when a first statement is taken in the absence of proper advisements and is *incriminating*, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it was procured after a *Miranda* violation. Absent "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a *Miranda* violation—even one resulting in the defendant's letting "the cat out of the bag"—does not "so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." [Citations.] Rather "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made." [Citations.]' [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 477.)

"The prosecution has the burden of establishing voluntariness by a preponderance of the evidence. Whether a confession was voluntary depends upon the totality of the circumstances. We accept a trial court's factual findings, provided they are supported by substantial evidence, but we independently review the ultimate legal question. [Citations.]" (*People v. Scott*, *supra*, 52 Cal.4th at p. 480.)

2. Custodial Interrogation

During the hearing on the motion to suppress, the prosecution essentially conceded that appellant was in custody when he was interviewed. The court instructed counsel that it was inclined to find the interview was custodial and that they need not address the custody issue. Some of the factors we examine to determine whether a custodial interrogation has taken place include the site of the interrogation, whether the person is aware that he or she is the focus of the investigation, whether objective indicia of arrest

are present, and the length and form of the questioning. (*People v. Milham* (1984) 159 Cal.App.3d 487, 500.) No one factor is dispositive and the relevant inquiry is whether a reasonable person in appellant's position would have felt restrained in a manner that was tantamount to a formal arrest. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 441–442.)

The officers were informed that appellant had been driving his Mustang around the time the double homicide occurred and appellant's car had been identified as the vehicle used in the shooting. Lieutenant Katz told appellant's father that appellant should surrender because he was wanted for questioning. Appellant's father brought appellant to the sheriff's station where he was taken inside and handcuffed.

Given the objective circumstances of this case, we conclude no reasonable person in appellant's circumstances would have felt free to walk away from the interrogation. We agree with the trial court's determination that appellant was in custody.

3. Routine Booking Questions

We reject appellant's contention that the questions posed by the detectives and the request to see appellant's tattoos were likely to elicit incriminating responses.

"The routine booking interview is an indispensable procedure in the efficient administration of justice." (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 971.) In *Pennsylvania v. Muniz* (1990) 496 U.S. 582 a four-justice plurality recognized "a 'routine booking question' exception which exempts from *Miranda's* coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" (*Id.* at p. 601, plur. opn. of Brennan, J.)

Lieutenant Katz testified that it was his practice at the beginning of an interview to obtain basic information in order to open up a rapport with the interviewee. A review of the record indicates that appellant was asked for his name, age, address, phone numbers, and employment history. None of these questions was likely to elicit incriminating responses from appellant and all can be classified as routine booking questions.

We also reject appellant's contention that Lieutenant Katz's request that appellant unbutton his shirt to display his gang tattoos was a *Miranda* violation. When appellant removed his jacket Lieutenant Katz observed tattoos on his body. Lieutenant Katz asked

if appellant had "any other ink" than that visible on his arms. With the prevalence of gangs, Lieutenant Katz would have been concerned about jail security and in particular appellant's safe housing in jail. Appellant's tattoos or other indicia of gang affiliation might alert Lieutenant Katz to the possibility of gang-related violence and so aided Lieutenant Katz in the booking process. Booking questions asked for administrative purposes of ensuring institutional security or the safety or health of inmates and staff have survived *Miranda* challenges. (See *United States v. Washington* (9th Cir. 2006) 462 F.3d 1124, 1132–1133 [FBI agent's inquiry regarding "gang moniker" was routine booking question asked to ensure prisoner safety].) While it can be implied that appellant had tattoos on his body, there is nothing in the transcript of the interview to indicate that the tattoos indicated gang membership and were incriminating.

4. Post-*Miranda* Statements

The detectives were not required to advise appellant of his *Miranda* rights at the beginning of the interview because not all statements obtained by the police from a suspect who is confined are the product of interrogation. (*People v. Ray* (1996) 13 Cal.4th 313, 337.) "Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda*, *supra*, 384 U.S. at p. 478.) "Volunteered statements of any kind are not barred by the Fifth Amendment." (*Ibid*.) Appellant's contention that his subsequent statements were tainted fails because of voluntariness.

In *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*), an officer arrested the defendant at his house for burglary. The officer did not advise the defendant of his *Miranda* rights and asked him if he knew why the officer was there, and if he knew certain burglary victims. The defendant gave an incriminating response. The defendant was later transported to the police station, advised of his *Miranda* rights, waived them, and gave a full statement. (*Elstad, supra,* at pp. 300–302.) The court held that the officer's initial failure to administer *Miranda* warnings did not taint the statements the defendant made after proper advisement and waiver of his *Miranda* rights. The court explained that a suspect who responds "to unwarned yet uncoercive questioning" may

later waive his rights and confess after being "given the requisite *Miranda* warnings," and if a suspect's initial unwarned statement was voluntary, "[t]he relevant inquiry is whether, in fact, the second statement was also voluntarily made." (*Elstad*, *supra*, at p. 318.)

The court in *Elstad* held that the admissibility of a subsequent post-*Miranda* statement turns solely on the issue of "whether it is knowingly and voluntarily made." (*Elstad*, *supra*, 470 U.S. at p. 309.) "As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative." (*Id*. at p. 318.) The court specifically declined to exclude the defendant's later statements as being the tainted fruit of the first non-*Mirandized* admission. (*Elstad, supra*, at pp. 305–308.)

Thus, we must independently review the record to determine whether appellant's initial pre-*Miranda* confession was involuntary or coerced, and whether it tainted his subsequent, post-*Miranda* confession.

Here, appellant volunteered the statement that he "was at church the whole day" in response to Lieutenant Katz asking him why he was there. Lieutenant Katz asked appellant a series of biographical questions to obtain information to complete the booking slip. There is no evidence that Lieutenant Katz or Detective Seymour pressured or coerced appellant. Appellant could have responded that he came in because he was aware that the police wanted to question him, or could have denied any knowledge of involvement in the crimes. Instead, appellant volunteered an alibi.

Lieutenant Katz then tried to clarify appellant's statement that he was in church the whole day. There is nothing in the circumstances of appellant's clarifying statements to indicate they were made involuntarily. Further, appellant had been detained for a relatively short time. He had been brought to the police station sometime after 10:00 p.m. and was interviewed around midnight. We are satisfied that appellant's statements to Lieutenant Katz and Detective Seymour were voluntarily given.

After appellant waived his *Miranda* rights, Detective Seymour asked him if he was willing to talk about what was going on. Throughout the post-*Miranda* interview, appellant proceeded to explain how he got to church, when he got to church, and who would have seen him there. Given the foregoing evidence and circumstances, we conclude that appellant's post-*Miranda* statements were also voluntary. Since all the statements were voluntary, the trial court did not err by admitting the post-*Miranda* statements into evidence.

5. Pre-*Miranda* Statements

The foregoing evidence reflects that appellant made the same statements about being in church *after* waiving his *Miranda* rights, that he made prior to waiving his *Miranda* rights. Thus, the jury would have heard that appellant claimed to have arrived at the church around noon, having gotten a ride there with Jose Vasquez, Jr., and proceeded to spend the rest of the day there until his parents picked him up around 10:00 p.m. that night. Accordingly, any error related to admitting the pre-*Miranda* statements is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

6. No Statements Were Admitted After Appellant Asserted His Right to Counsel

Appellant contends that the detectives ignored his invocation of counsel after he was read his *Miranda* rights when he stated, "On the real, I don't even want to say anything. Umh, I'll wait for my lawyer."

We need not address appellant's claim on the merits because the issue was rendered moot when the subsequent statements by appellant were not admitted into evidence.

II. Prosecutorial Misconduct

Appellant contends the prosecutor committed the following instances of misconduct during closing argument: (1) repeatedly shifted the burden of proof to the defense; (2) argued that the defense function was to confuse the jury; (3) accused the

defense of falsifying evidence; and (4) vouched for the credibility of a key witness. We disagree.

A. Waiver

The People assert that appellant waived or forfeited any claim of prosecutorial misconduct. A defendant alleging prosecutorial misconduct is required to make a timely objection, state his reason for the objection, and request the jury be admonished. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The admonishment requirement is subject to an exception for futility. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.) "[F]ailure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) Also, failure to object does not preclude arguing on appeal deprivation of constitutional rights. (*People v. Vera* (1997) 15 Cal.4th 269, 277.)

Appellant acknowledges his trial attorney did not object and request an admonition as to every instance of prosecutorial misconduct asserted on appeal. Nevertheless, appellant argues that his objections should be deemed preserved and addressed on the merits, because the acts of misconduct individually and collectively violated his fundamental federal constitutional rights to due process, a fair trial, and confrontation. (*People v. Vera, supra*, 15 Cal.4th at p. 277.)

We agree that defense counsel failed to object on grounds of prosecutorial misconduct and/or seek a curative admonition, and therefore forfeited the objections on appeal. (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Nevertheless, we address these contentions and conclude that all of appellant's prosecutorial misconduct claims fail on the merits. In every instance cited, misconduct either did not occur or was harmless.

B. Applicable Law on Prosecutorial Misconduct

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is

prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*Ibid.*)

A defendant's conviction will not be reversed for prosecutorial misconduct that violates state law unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071.)

C. Shifting the Burden of Proof

The prosecutor argued that defense counsel offered no evidence that appellant "did not act guilty" or "acted like an innocent person." Appellant claims that it was improper for the prosecutor to argue in rebuttal that the defense was unable to point to any evidence that was inconsistent with appellant being involved in a double murder.

The evidence presented at trial included testimony from eyewitnesses linking appellant's vehicle to the crime, appellant's attempts to hide his vehicle, witness accounts that he appeared "anxious," "worried," and "not stable," and appellant's alibi during his interview with Lieutenant Katz and Detective Seymour. The prosecutor's statement was a fair comment on the weaknesses in appellant's evidence, and suggested that if there was other evidence which could have proven appellant's innocence, the defense had not presented it. This is permissible argument as prosecutors may comment on the defense's failure to introduce evidence or to call logical witnesses. (*People v. Cornwell* (2005) 37 Cal.4th 50, 90, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The prosecutor did not argue that appellant was *required* to present any evidence. In rebuttal when the prosecutor argued that defense counsel had not given her "one single thing that the defendant did that day which would tend to show that he was innocent," she immediately followed up with the statement "The defense doesn't have to do that." We

agree that "[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) We are satisfied that line was not crossed by the prosecutor's argument in this case.

D. Confusing the Jury

Appellant complains that the prosecutor referred to defense counsel's interpretation of the evidence as "fantasy," and that defense counsel was a "good story teller" who "raised a lot of red herrings." Citing *Berger v. United States* (1935) 295 U.S. 78, 88 (*Berger*); *People v. Reyes* (1974) 12 Cal.3d 486, 505–506 (*Reyes*); and *People v. Coulter* (1989) 209 Cal.App.3d 506, 514–515 (*Coulter*), appellant contends that the prosecutor committed misconduct in this portion of her argument because a prosecutor may not argue that the function of the defense is to confuse the jury and equate the prosecutor's function with seeking the truth.

A prosecutor is given wide latitude during argument and may use "appropriate epithets" in vigorously arguing the case to the jury. (*Hill, supra,* 17 Cal.4th at p. 819.) Moreover, "[a]n argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47.)

Contrary to appellant's contention we do not characterize the prosecutor's statements as a denigration of counsel but rather of a defense theory, something the prosecutor is entitled to do. The prosecutor's comments did not exceed the bounds of "'vigorous yet fair argument'" or constitute an outrageous epithet. (*People v. Sanders* (1995) 11 Cal.4th 475, 527.)

Appellant cites a specific example when the prosecutor equated the defense strategy to that of a squid that intentionally squirts out ink to "muddy up the waters" so as to make his escape. The jury could certainly understand it to be nothing more than urging the jury not to be misled by the defense. (See *People v. Cummings, supra*, 4

Cal.4th at p. 1302 [prosecutor's characterization of defense tactics as "'ink from the octopus'" not misconduct]; *People v. Marquez* (1992) 1 Cal.4th 553, 575, 576 [prosecutor's reference to defense as "smokescreen" not misconduct].)

The cases appellant relies on are distinguishable. *Berger* is inapposite. The prosecutor in *Berger* committed numerous acts of misconduct including: misstating the facts on cross-examination; putting words into the witnesses' mouths; suggesting by his questions that statements had been made to him outside of court; pretending to understand that a witness had said something that he had not said and persistently cross-examining the witness on that point; assuming prejudicial facts not in evidence; bullying and arguing with witnesses; and making an argument that was "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." (*Berger, supra,* 295 U.S. at pp. 84, 85 88.) While the court in *Berger* lists these examples of prosecutorial misconduct, it does not address the specific point raised here. Likewise, *Reyes* does not address appellant's contention. Nor does *Coulter,* the third case cited by appellant, where the defendant argued "that the prosecutor committed prejudicial misconduct during closing argument by arguing [that] defense counsel had a duty to create a doubt even if he believed [the defendant] guilty." (*Coulter, supra,* 209 Cal.App.3d at p. 514.)

Finally appellant cites *People v. Woods* (2006) 146 Cal.App.4th 106 (*Woods*), and the court's finding of prosecutorial misconduct there for the proposition that the prosecutor here crossed the line in arguing that it was a "coincidence" that "all of a sudden" the defense witnesses all told the same story.

In *Woods,* the prosecutor committed misconduct by arguing that the defendant was "'obligated' to put on evidence." (*Woods, supra,* 146 Cal.App.4th at p. 113.) The court found additional instances of serious prosecutorial misconduct in several other arguments of the prosecutor. The prosecutor also employed "factually unsupported argument" and "argument [that] was largely nonsensical." (*Id*. at p. 116.) The court considered the cumulative effect of the prosecutorial misconduct and determined that the respondent had not overcome its burden of "proving beyond a reasonable doubt that the error did not

contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24 . . . .)" (*Id*. at p. 117.)

Here, unlike *Woods*, the prosecutor did not assert that the defense had the obligation to present evidence. Her argument was factually supported and was a fair comment on the evidence.

E. Falsifying Evidence

Appellant contends that the prosecutor's characterization of "staged pictures" when referring to photographs presented by the defense to attack the credibility of a prosecution witness implied that the defense falsified evidence.

Charles Lemus testified that he could look out the front window by turning around when he was seated at the computer in the living room. He testified regarding the movement of the Mustang and Suburban, and appellant's conversations with George Gomez were based in part on his observations through the front window. His testimony was corroborated by that of Gomez with respect to the conversation, and by Daniel Renteria who admitted moving his Suburban into appellant's driveway.

In July 2010, defense counsel went to appellant's home approximately ten days before Irma Lemus testified at trial. Ms. Lemus owned a 1996 Ford Mustang. Ms. Lemus testified that she and defense counsel parked the vehicle, then took some pictures "in relation to the computer table," and walked around the house "looking out of windows from where the computer table [was]." She proceeded to testify that it was not possible to see a car parked in appellant's driveway from the computer desk in appellant's living room.

Appellant's argument is that the prosecutor's use of the word "staged" had a negative connotation. The prosecutor's argument was factually correct as defense counsel attempted to recreate events that occurred more than two years earlier. The prosecutor's argument was a reasonable interpretation of the evidence presented. (*People v. Willingham* (1969) 271 Cal.App.2d 562, 574.) A prosecutor is given wide latitude in closing argument, and her argument may be vigorous as long as it amounts to a fair comment on the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 200.)

F. Vouching for the Credibility of a Witness

Appellant contends that the prosecutor committed misconduct by vouching for the credibility of a witness, Charles Lemus. The prosecutor stated, "I don't think he's crazy. Why would I establish that he's crazy? You all saw him. Is he crazy?"

Appellant introduced evidence that at one point Charles Lemus was institutionalized in a mental hospital. His aunt, Irma Lemus, testified that he was "mentally ill," and his grandmother said he was "sick" and had mental health issues. During closing argument, the prosecutor was commenting on how the defense dealt with unfavorable evidence. She argued that the defense strategy was to "take it out of context," "make misstatements about it" or argue that some people were crazy. It was in this context that the prosecutor asked the jury to judge for themselves whether Charles was mentally ill and the weight that should be accorded to his testimony based on their observations of him when he testified during the trial and the recorded interviews with the police which were played for the jury.

"A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them, but may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record. [Citations.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 958.) Here, the prosecutor's statement is more reasonably interpreted as an appeal to the jurors' common sense and experience as it bore upon their evaluation of Charles's credibility.

Although the prosecutor's first comment could be viewed as a personal assurance of the witness's sanity, her follow-up statements clarified that it was the jury's responsibility to make that determination. To the extent the comment was error, we find that its minimal nature, the prosecutor's immediate follow-up, and the trial court's instruction to the jury to determine the credibility of witnesses itself, based solely on facts presented at trial, rendered any error harmless. (CALCRIM Nos. 105, 200, 220, 222, 318.)

III. Substantial Evidence Supports the Convictions

Appellant contends the evidence was insufficient to sustain the convictions. Specifically, he argues that the prosecution failed to prove that the only reasonable conclusion supported by the circumstantial evidence was that appellant was guilty. We disagree.

When an appellant challenges the sufficiency of the evidence to support a conviction, "we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We "'"presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We draw all reasonable inferences in support of the judgment. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) "An inference is not reasonable if it is based only on speculation." (*People v. Holt* (1997) 15 Cal.4th 619, 669.)

The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. (*Ibid.*) '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Applying this standard, appellant's argument fails to persuade us that reversal of the convictions is warranted.

Appellant, a 19-year-old Hispanic with very short hair was seen leaving his home in his distinctive Mustang, prior to the time the murders were committed. Appellant was wearing a black jacket. Four eyewitnesses identified appellant's vehicle at the scene of the murders. Carlos Cruz described the occupants of the Mustang as Latinos with shaved

heads between 18 and 20 years of age. Sharice Royal described the shooter as a Hispanic male in his "late teens, early 20's," who had a very short haircut and wore a black hoodie sweater. Seconds after the murders were reported, a vehicle fitting the description of appellant's Mustang was seen by Detective Kirste speeding in the vicinity of the crime scene. Witnesses told Detective Kirste that the Mustang turned onto 127th Street, which is the street where appellant lived.

When appellant returned home he was seen by his brother removing an outer layer of clothing which was black. A black hoodie was found on the back seat of the Mustang. Gunshot residue was found on a Los Angeles Dodgers windbreaker that was recovered from the washing machine of the house next to appellant, where his grandparents and aunt Irma lived.

Appellant's postcrime conduct was incriminating. (See *People v. Thompson* (2010) 49 Cal.4th 79, 113 [postrcrime behavior is '"highly probative of whether defendant committed the crime'"].) The jury heard that after the murders, appellant pulled into his driveway so fast he scraped the bottom of the Mustang on the ground. He ran to the patio and removed his outer clothing. He appeared "anxious" and was "talking really fast" when he asked his relatives to move their vehicles into his driveway behind the Mustang to obscure the Mustang from being observed from the street. Hours later, when his street was blocked off by the police containment action, he appeared "worried" and "not stable" when talking to Jose Vasquez, Jr., at the church.

Appellant was a documented Largo 36 gang member and the drive-by murders were committed in the territory of a rival gang. The gang expert opined that the crimes were committed for the benefit of and in association with the Largo 36 gang. While incarcerated at Men's Central Jail awaiting trial, appellant showed allegiance to Largo 36 by placing gang graffiti on his jail issued shower sandals.

Appellant's alibi was contradicted by witness testimony and forensic evidence. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1029 ["Evidence the defendant used a false alibi is relevant to prove consciousness of guilt"].) Appellant concocted an alibi for his whereabouts on April 20, 2008. At first, he told Lieutenant Katz and Detective

Seymour that he had been in church "the whole day" but later stated that he got there "at twelve." He claimed that he got a ride to church with Jose Vasquez, Jr., and that others would attest to his presence in the church.

Sometime between 1:30 and 2:00 p.m. as George Gomez and his family were leaving their home appellant asked him to move his truck and block appellant's driveway. Appellant's grandmother called appellant in the afternoon and he answered his cell phone. Cell phone records showed that at 1:39 p.m. and at 1:44 p.m. that afternoon, appellant's phone was connecting with a cell tower located near his home, and not with towers located by the church. Jose Vasquez, Sr., the pastor, saw appellant in the church at 2:40 p.m. Jose Vasquez, Jr., testified that he did not give appellant a ride to the church.

Reviewing the evidence in the light most favorable to the judgment, we are satisfied that substantial evidence supports appellant's convictions.

IV. Gun Enhancements in Section 12022.53 Do Not Violate Constitutional Norms

Appellant contends that the twenty-five years to life sentences imposed for the gun enhancements under section 12022.53 violate equal protection because they punish aiders and abettors of crimes committed for the benefit of street gangs more severely than aiders and abettors of non-gang crimes. He also argues the enhancements imposed under section 12022.53 violate due process by not requiring that the aider and abettor knew or intended that the perpetrator would commit a homicide in discharging a firearm.

Section 12022.53 provides for a 20-year enhancement, or 25 years if the victim suffers great bodily injury or dies, for anyone who personally and intentionally discharges a firearm in the commission or attempted commission of certain felonies, including murder, and these enhancements extend to aiders and abettors if the offense is committed for the benefit of a criminal street gang.[11]

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[11] Section 12022.53, subdivision (d) states: "Notwithstanding any other provision of law, any person who, in the commission of [murder, or other crimes] personally and intentionally discharges a firearm and proximately causes . . . death, to any person other than an accomplice, shall be punished by an additional and consecutive term of

There is no merit to appellant's challenge. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 12–14 (*Gonzales*).) In *Gonzales*, the Court of Appeal upheld this sentencing scheme against a claim that it unreasonably discriminated between aiders and abettors of gang crimes and other aiders and abettors. (*Id.* at pp. 12–13.) The court held defendants had failed to meet a prerequisite for an equal protection analysis—a showing the two groups being compared are sufficiently similar with respect to the purpose of the law in question to trigger an inquiry into whether their disparate treatment is justified. (*Id*. at p. 12.) "Defendants' arguments fail to establish that they are similarly situated to other aider and abettors," the court stated, because "[u]nlike other aiders and abettors who have encouraged the commission of a target offense resulting in a murder, defendants committed their crime with the purpose of promoting and furthering their street gang in its criminal conduct." (*Id*. at p. 13.)

Appellant is mistaken when he contends that the liberty interest at stake in avoiding a lengthy enhancement requires review under the strict scrutiny standard. A defendant '"does not have a fundamental interest in a specific term of imprisonment or in the designation a particular crime receives.'" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Thus, the Legislature '"is not prohibited by the equal protection clause from striking the evil where it is felt the most.'" (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 482.)

Applying the natural and probable consequences doctrine to aiders and abettors does not violate due process. (*Gonzales, supra,* 87 Cal.App.4th at p. 15.) Under aider and abettor liability principles, "the only requirement is that the aider and abettor intend

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imprisonment in the state prison for 25 years to life." Subdivision (e)(1)extends these penalty enhancements to aiders and abettors as follows: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [i.e., committed the offense for the benefit of a criminal street gang and with the specific intent to promote, further or assist in any criminal conduct by gang members]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c) or (d)." Under section 31 a "principal" includes not only those persons who directly commit the act but also those who "aid and abet in its commission."

to facilitate the target offense and that the offense ultimately committed is the natural and probable consequence of the target offense." (*Ibid*.) Nor is there any due process issue of vagueness or ambiguity in whether the Legislature intended section 12022.53 to apply to aiders and abettors: "this statute is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and abet that offense in furtherance of the objectives of a criminal street gang." (*Gonzalez*, *supra*, at p. 15.) We find no merit to appellant's due process challenge.

V. CALCRIM No. 372—Flight Instruction

Appellant contends the trial court erred in instructing the jury with CALCRIM No. 372[12] because there was no substantial evidence that he fled the crime scene. Appellant contends it violated his due process rights because it reduced the prosecution's burden of proof. Appellant also contends the instruction is unconstitutional. The People argue that appellant forfeited his right to appellate review and that there was no error.

On the issue of forfeiture the People argue that appellant agreed to the court's instruction and failed to raise any objection. But, ascertaining whether claimed instructional error affected the substantial rights of appellant necessarily requires an examination of the merits of the claim to ascertain whether the asserted error would result in prejudice. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

Errors in jury instructions are questions of law which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.) Generally, a flight instruction is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt. (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) A defendant's departure must suggest a purpose to avoid observation or arrest. (*Ibid*.) "To obtain the instruction, the prosecution

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[12] The court instructed the jury: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct; however, evidence that the defendant fled cannot prove guilt by itself."

need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*Ibid.*)

Giving the flight instruction was not error because the evidence permits the reasonable inference that appellant departed the crime scene to avoid being arrested for the drive-by double murders. Appellant, who did not testify at trial, argues in his opening brief that there was "no evidence" he fled. In response, the People emphasize that appellant drove away "very fast" from the scene. Detective Kirste observed appellant's Mustang travelling at twice the posted speed limit. Shortly after the murders, appellant asked his relatives to block his Mustang in his driveway to avoid detection. Appellant's actions after the shootings "demonstrated that he was trying to avoid being observed or arrested" and "permitted an inference that his movement was motivated by guilty knowledge," as the People argue.

Contrary to appellant's contention, the instruction did not reduce the prosecution's burden of proof. (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30–31 (*Paysinger*).) The instruction directs the jury to decide if the defendant fled and to "decide the meaning and importance" of that conduct. (CALCRIM No. 372.) Moreover, the instruction directs that evidence of flight "'cannot prove guilt by itself.'" (*Paysinger, supra*, at pp. 29, 30.) Thus the existence and significance of flight is an issue left to the jury's determination. (*People v. Crandell* (1988) 46 Cal.3d 833, 870, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.)

We do not view CALCRIM No. 372 in isolation. "We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.) Here, the court instructed the jury on the elements of the offense and that the prosecution was required to prove each element of the crime. The court also instructed the jury that it had to find appellant guilty beyond a reasonable doubt.

Lastly, we reject appellant's contention that the instruction is unconstitutional. Appellant acknowledges this precise issue was raised and rejected in *Paysinger*, *supra,* 174 Cal.App.4th at pp. 30–31. He asserts, however, *Paysinger* was wrongly decided as the appellate court's analysis was flawed. We disagree.

The *Paysinger* court began its analysis by recognizing that appellate courts review jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood a challenged instruction in the manner claimed. (*Paysinger, supra*, 174 Cal.App.4th at p. 30.) The court noted that the word "'if'" in the instruction's opening clause ("'If the defendant fled or tried to flee immediately after the crime was committed,'") makes the entire clause conditional. Therefore, it was "highly unlikely a reasonable juror would have understood the instruction as dictating that 'the crime was committed.'" (*Ibid.*) Furthermore, the language of other jury instructions had to be considered, including "(1) 'You must decide what the facts are'; (2) 'It is up to all of you and you alone to decide what happened'; (3) 'A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt[]'; and (4) 'Remember that you may not convict a defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant's guilt[] of that crime has been proved beyond a reasonable doubt.'" (*Ibid.*) The court noted that there was no dispute whether a crime occurred. The only issue was whether the defendant was one of the perpetrators. Consequently, the court concluded it was not reasonably likely the jury would have interpreted the CALCRIM No. 372 instruction in a manner that undermined the presumption of innocence or lessened the prosecutor's burden of proof. (*Paysinger, supra,* at p. 31.)

We agree with the *Paysinger* court's analysis and conclude it is fully applicable in this case. We reject appellant's assertion the opening clause of the instruction rendered the instruction constitutionally infirm.

VI. Juror Contact Information

Appellant contends the trial court erred by denying his motion to disclose juror identifying information necessary to assist the defense in their preparation of a new trial motion.

A. Background

1. Appellant's Motion

Four months after the jury's verdict, appellant's new counsel filed a petition for the release of confidential juror information pursuant to Code of Civil Procedure sections 206, subdivision (g), and 237, subdivision (b). In support of the petition were attached declarations from two defense witnesses, Maricela Razo, and Elizabeth Garcia.[13] Razo and Garcia each stated they had heard the foreperson of the jury say that the case was taking too long, and that it did not matter what the defense presented because her mind was made up and could not be changed. These statements were allegedly made in the hallway outside the courtroom.

2. The People's Opposition

The prosecution filed written opposition arguing that appellant's motion and supporting declarations failed to make a prima facie showing of good cause for the release of the information as required by Code of Civil Procedure section 237, subdivision (b), because a "sufficient showing to support a reasonable belief that jury misconduct occurred" as set forth in *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552 (*Rhodes*) was not established. The prosecution also argued appellant's objective was "to inquire into their thought processes during deliberations" in violation of Evidence Code section 1150, subdivision (a).

The prosecution argued that the evidence suggested the jurors followed the law because they asked for read back of testimony, deliberated over the course of three days, and deadlocked on the non-murder charges.

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[13] Razo was the girlfriend of appellant's fellow Largo 36 gang member, Anthony Martinez, who also was a defense witness. Garcia was Martinez's mother. Their trial testimony related to counts 3 through 6 and was not relevant to any issues on appeal.

3. Hearing and Ruling

Appellant's counsel informed the court that Razo and Garcia told her that they had told appellant's trial counsel of the foreperson's statement and he had "failed to bring this to the court's attention." The court observed that "another interpretation could be that the information, whatever was conveyed, was deemed benign by defense counsel and, simply, they did not share it with me." The prosecutor informed the court that appellant's former counsel told her that during the trial appellant's father had raised a similar concern about remarks made by the same juror. Appellant's former counsel believed it was an expression of frustration and did not bring it to the court's attention. Appellant's former counsel would not testify on the issue unless appellant agreed to waive the attorney-client privilege.

The court denied the motion finding that appellant had failed to show good cause. The court found that the declarations were "de minimis, if not trivial, to some extent, and in no way do they specifically opine on the evidence in the case."

B. Applicable Legal Principles

After a jury verdict in a criminal case, the court's record of personal juror identification information (names, addresses, and telephone numbers) is sealed. (Code Civ. Proc., § 237, subd. (a)(2).) On a petition filed by a defendant or his or her counsel, a trial court may in its discretion grant access to such information when necessary to the development of a motion for new trial or "any other lawful purpose." (Code Civ. Proc., § 206, subd. (g).)

The applicable test for good cause in this context is set forth in *Rhodes, supra*, 212 Cal.App.3d 541. The party seeking disclosure must make "a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the juror[] through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial." (*Id*. at

p. 552.)[14] There is no good cause where allegations of jury misconduct are speculative, conclusory, or unsupported, or where the alleged misconduct is not "of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a); see *Rhodes, supra,* at pp. 553–554.)

Trial courts have broad discretion to allow, limit, or deny access to jurors' personal contact information (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1091), and we review the denial of a petition filed pursuant to Code of Civil Procedure section 237 for an abuse of discretion (*People v. Jones* (1998) 17 Cal.4th 279, 317).

C. Analysis

We conclude the court did not abuse its discretion in denying appellant's motion for release of the sealed juror contact information because his motion and the supporting declarations failed to cite facts "sufficient to establish good cause" for the release of the information as required by Code of Civil Procedure section 237, subdivision (b).

The claim of juror misconduct was wholly speculative. The accusations of misconduct were based solely on statements by the girlfriend and mother of appellant's friend and fellow Largo 36 gang member Anthony Martinez, who had testified on behalf of appellant. The declarations were produced some four months after the jury's verdict. As the court noted, appellant's experienced trial counsel failed to bring "*whatever was conveyed*" to the court's attention. In a conversation with the prosecutor, appellant's former counsel did not confirm that he was informed of the foreperson's alleged statements by Razo or Garcia. He recalled that at some point appellant's father Carlos Lemus said he overheard the foreperson state that the trial was taking too long and that she had enough information to decide the case. Appellant's former counsel did not bring that matter to the court's attention. It is noted that appellant's father had to be admonished early in the proceedings to stay away from the prosecution's witnesses.

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[14] Although *Rhodes* was decided before the revision of section 206 and the enactment of section 237 of the Code of Civil Procedure, the *Rhodes* test remains applicable. (See *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.)

Appellant's allegations of juror misconduct were speculative, vague, and conclusory, and failed to set forth a sufficient showing to support a reasonable belief that jury misconduct occurred. (*Rhodes, supra*, 212 Cal.App.3d at pp. 553–554.)

VII. The Parole Revocation Fine Must Be Stricken

The trial court imposed a $10,000 parole revocation fine (Pen. Code, § 1202.45) which was stayed pending successful completion of parole. The People concede, and we agree, that because appellant was sentenced to life terms without the possibility of parole, no parole revocation fine could be imposed. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 687.) Accordingly, that portion of the court's judgment imposing a parole revocation fine shall be stricken.

DISPOSITION

The judgment is modified as follows: The parole revocation fine of $10,000 is stricken. The trial court is directed to amend the abstract of judgment to reflect this modification and to forward certified copies of the amended abstracts to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.) The judgment is affirmed as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ